RESCUING A TROUBLED CONCEPT: AN ALTERNATIVE VIEW OF THE RIGHT TO DEVELOPMENT*

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ABSTRACT

This article proposes an alternative view of the "right to development" which is supported by certain norms whose bases are well-established in international law. Such a view is necessitated by the unjustified expansion of the right's definition courtesy of the 1986 Declaration on the Right to Development and the equally expansionary tendencies of some of its proponents. An expanded definition of the right to development, however, dilutes its strength as a legal principle. How can the right to development be conceived and advanced as a principle of international law possessing a "hard-law" status? What are the precise contents of this right and against whom can they be claimed? This article argues that the right to development regroups and consolidates into a single rubric certain fundamental norms and draws its legal strength from their simultaneous and interlocking operation in the international system.

I. THE RIGHT TO DEVELOPMENT AND THE INTERNATIONAL LAW PROCESS

A. INTRODUCTION

It was during the wave of decolonisation in the 1960s when the right to development was first articulated by the developing countries as a companion of their newly acquired political emancipation from their colonial masters.[1] As

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[1] Mohammed Bedjaoui, *The Right to Development* in MOHAMMED BEDJAOUI (ED), INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS (1991) 1177.

originally envisaged, the right to development was not a human right claimable by individuals against their own state, but a people's right. After the 1960's, it took the form of a demand by the developing countries against the developed countries to end the perpetuation of colonialist policies of economic domination and exploitation.[2] It became associated with two specific demands, namely, the establishment of a "new international economic order" more conducive to the economic progress of developing countries, and the adherence to the notion that peoples must have full control over their natural wealth and resources.[3] Because of their economic dependency on developed countries, the newly independent developing countries were then calling for a restructuring of the global economic system through a New International Economic Order.[4] The UN General Assembly adopted the Resolutions on the Declaration on the Establishment of a New International Economic Order[5] and the Charter on the Economic Rights and Duties of States[6] in 1974, both of which outlined the features of this envisioned international economic order.

The first articulation of the right to development happened alongside "the elevation of economic development issues to the top of the international agenda in various fora during the 1960's and 1970's."[7] During this period, while the Western world was trumpeting individual human rights guaranteed in the Universal Declaration of Human Rights (UDHR),[8] the International Covenant on Civil and Political Rights (ICCPR)[9] and the International Covenant on Economic, Social and

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[2] David Beetham, *The Right to Development and Its Corresponding Obligations in* BARD ANDREASSEN AND STEPHEN MARKS (EDS), DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL AND ECONOMIC DIMENSIONS (2006) 79, 79-80.

[3] *Ibid* 79. *citing* LAURENT MEILLAN, 'LE DROIT AU DEVELOPPEMENT ET LES NATIONS UNIES: QUEQUES REFLEXIONS' (2003) 34 DROIT EN QUART MONDE 14.

[4] Khurshid Iqbal, *The Declaration on the Right to Development and Its Implementation* (2007) 1 POLITICAL PERSPECTIVES GRADUATE JOURNAL 1, 4.

[5] *Resolutions on the Declaration on the Establishment of a New International Economic Order,* GA Res 3201 (S-VI), UN GAOR Supp. (No. 1) 3, UN Doc A/9559 (1974) and GA Res 3202 (S-VI), UN GAOR Supp. (No. 1) 5, UN Doc A/9559 (1974).

[6] *The Charter on the Economic Rights and Duties of States,* GA Res 3281 (XXIX), 29th sess, agenda item 48, A/RES/29/3281 (1974).

[7] Anne Orford, *Globalization and the Right to Development* in Philip Alston (ed), PEOPLES' RIGHTS (2001) 127, 129.

[8] *Universal Declaration of Human Rights,* UN GA Res 217A (III), UN Doc A/810, 10 December 1948.

[9] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS No. 14668 (entered into force 23 March 1976) (*'ICCPR'*).

Cultural Rights (ICESCR),[10] a significant number of developing countries were testing the waters, so to speak, by crafting a collective right to development to bolster their demand for fundamental changes in their economic relationship with the developed world. Historically, the right to development has always been about correcting what is wrong in the global economic order. From its inception, it was meant to address the effects of the asymmetrical relationship between the developed and developing countries. During a 1967 meeting of the Group of 77 developing countries, the foreign minister of Senegal emphatically declared that:

> Our task is to denounce the old colonial compact and to replace it with a new right. In the same way that developed countries proclaimed individual rights to education, health and work, we must claim here, loud and clear, that the nations of the Third World have the right to development.[11]

The right to development was first officially recognised by the UN Commission on Human Rights in 1977.[12] The then Commission acknowledged the right to development as a human right and recommended to the Economic and Social Council to invite the Secretary-General to undertake a study on the subject. With the creation of a Working Group of Government Experts on the Right to Development in 1981, the debate on the right was formally elevated in the UN agenda.[13] The Declaration on the Right to Development was subsequently adopted by the UN General Assembly in 1986 in an almost unanimous vote, with only the US casting a negative vote and eight other states abstaining.[14]

The right to development was also recognised in politically significant conferences of world leaders. The World Conference on Human Rights held in 1993 reaffirmed the right to development, as formulated in the 1986 Declaration, as a universal and inalienable right and an integral part of fundamental human rights.[15] During this conference, a consensus was reached among developed and

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[10] *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) (*'ICESCR'*).

[11] Laurent Meillan, *Le Droit au Developpement et les Nations Unies: Queques Reflexions* (2003) 34 DROIT EN QUART MONDE 14.

[12] UN Commission on Human Rights, Resolution 4 (XXXIII) of 21 February 1977.

[13] UN Commission on Human Rights, Resolution 36 (XXXVII) of 11 March 1981.

[14] *The Declaration on the Right to Development,* GA Res 41/128, UN GAOR, 41st sess, 97th plen mtg, UN Doc A/RES/41/128 (1986).

[15] *Vienna Declaration and Program of Action,* UN Doc. A/CONF.157/24 (Part I), art 10, (1993), reprinted in 32 ILM 1661, art 10.

developing countries that the right to development is indeed a human right.[16] In 2000, world leaders attending the UN Millennium Summit reached an agreement on a set of goals and targets for fighting extreme poverty, environmental degradation, disease, hunger and discrimination against women, which later became the Millennium Development Goals. The Summit Declaration included a pledge "to making the right to development a reality for everyone and to freeing the entire human race from want."[17]

B. CRITICISMS AGAINST THE "RIGHT TO DEVELOPMENT"

The right to development is not without criticisms, both with respect to its basis in public international law and its susceptibility to implementation in actual controversies.[18] Some burning questions remain to be answered and some apparent answers need to be questioned: Does the right to development have a firm basis in international law to begin with? Has it crystallised into something more than a "soft law" to be of any practical use to international lawyers? What is the precise content of the right to development and against whom can it be claimed?

Some sceptics dismiss the validity of the right to development because it is allegedly a "right to everything," the "sum of all human rights" or an amalgamation of all the existing individual human rights.[19] They claim that the right does not add anything new and substantial to the existing body of human rights law because, as the criticism goes, all it does is to combine existing individual human rights. This misconception about the right to development is fuelled by at least two official UN reports that actually endorsed "the view that the right to development is less of a separate right than a synthesis of all other human rights."[20]

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[16] Iqbal, *supra* note 4 at 6.

[17] *The Millennium Declaration,* UNGA Res A/RES/55/2 (2000), para. 11.

[18] *See especially* Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development* (1985) 15 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 473.

[19] Yashi Gai, *Whose Human Right to Development?* (Commonwealth Secretariat Series of Occasional Papers on the Right to Development, 1989) 13-15; Donnely, *supra* note 18, 481.

[20] Report of the Secretary General, *The International Dimensions of the Right to Development as a Human Right in Relation with Other Human Rights Based on International Cooperation, Including the Right to Peace, Taking into Account the Requirements of the New International Economic Order and Fundamental Human Needs,* UN Doc, E/CN.4.1334

Another criticism commonly raised against the right to development is its alleged "non-justiciable" nature.[21] Indeed, the same criticism is also levelled against ESC rights in general. For example, Hans Kelsen argued that "the essential element [of a right] is the legal power bestowed upon the [individual] by the legal order to bring about, by a lawsuit, the execution of a sanction as a reaction against the non-fulfilment of the obligation."[22] Jack Donnelly is likewise of the view that human rights must entail clear legal obligations on the part of "duty-holders" if they are to qualify as rights in the real sense.[23]

Finally, the right to development has been criticised as granting states the justification in pursuing a narrow model of economic development at the expense of the human rights of its people.[24] With this right, the state is allegedly prone to sacrificing the human rights of its people in order to pursue its own version of economic development. Anne Orford observed that "[t]he right to development has become something of a mantra for states seeking to justify the privileging of economic development over human rights and to legitimize repressive or authoritarian policies."[25] The criticism is based on the fear that the right to development will allow a state to put the interests of foreign investors and multinational corporations who bring capital into the country over the human rights of its people.

C. THE PURPORTED "DUAL NATURE" OF THE RIGHT TO DEVELOPMENT AND ITS DILUTING EFFECT ON THE RIGHT'S NORMATIVE STRENGTH

While the adoption of the Declaration on the Right to Development in 1986 has brought to the fore important issues concerning the right's normative

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(1979); Commission on Human Rights, *Report of the Working Group of Governmental Experts on the Right to Development,* UN Doc E/CN.4/1489, 38th Sess, Prov Agenda Item 8, at 3 (1982).

[21] Amartya Sen, *Human Rights and Development* in BARD ANDREASSEN AND STEPHEN MARKS (EDS), DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL AND ECONOMIC DIMENSIONS (2006) 1, 2-3.

[22] Hans Kelsen, *Pure Theory of Law* 125-26 (1967); also cited in E.W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights* (1978) 9 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 69-105.

[23] Donnelly, *supra* note 18 at 473.

[24] Yash Ghai, *Human Rights and Governance: The Asia Debate* (1994) 15 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 1, 9.

[25] Orford, *supra* note 7 at 132-33.

content,[26] it must be pointed out that the legal basis of the right is not the declaration itself which, true to its name, is merely declaratory of its existence (although an unduly expanded version of it). What is notable in the Declaration is its explicit departure from the original conception of the right to development as a collective entitlement of peoples. The Declaration defines the right to development as: "an inalienable human right by virtue of which *every human person* and *all peoples* are entitled to participate in, and contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[27]

From this formulation, it is clear that the right to development, as envisaged by the drafters of the Declaration, is both an individual human right to be enjoyed by every individual and a collective right guaranteed to entire peoples.

This article rejects this alleged "dual nature" of the right to development because such conception is not supported by the historical development of the right, and more importantly, such conception places the right on shaky legal foundations. Adding an "individual" dimension to the right to development does not give it clarity and focus; instead, such addition only dilutes its normative strength as a legal principle. Isabella Bunn similarly argued that the dual nature of the right creates "difficulties in identifying the beneficiaries and duty-holders under the right."[28] To regard the right to development as a right of every individual within a state makes it vulnerable to a serious definitional challenge. Being a proponent of this dualist perspective, Amartya Sen defined the right to development as "a conglomeration of a collection of claims, varying from basic education, health care and nutrition to political liberties, religious freedoms and civil rights for all."[29] The over expansiveness of his definition is readily apparent because it describes the right to development, not only as a *collection* of virtually all human rights claims, but it is also a *conglomeration* of such collections. Sen also offered a definition of the concept of development as the "expansion of

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[26] Stephen Marks, *The Obstacles to the Right to Development* (Working Paper, Francois-Xavier Bagnoud Center for Health and Human Rights, Harvard University, 2003) 6-7.

[27] *The Declaration on the Right to Development*, art 1(1). (Emphasis added)

[28] Isabella Bunn, *The Right to Development: Implications for International Economic Law* (2000) 15 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1425, 1435.

[29] Sen, *supra* note 21 at 5.

substantive freedom or capabilities of persons to lead the kind of lives they value or have reason to value."[30] But what is meant by development of an individual? If it is the amalgamation or sum of all human rights guaranteed in the two covenants,[31] why collapse them into one mega-right and on what basis? While Sen's definitions are a good exercise in philosophical abstraction, they fall short as a source of concrete entitlements on the part of the "rights-holder" and identifiable obligations on the part of the "duty-bearers." Therefore, they do not help in the articulation of a right that badly needs a practical and usable definition to remain relevant in human rights law.

Arjun Sengupta, the former UN Independent Expert on the Right to Development, formulated yet another expansive definition of the right to development, thus:

> The right to development refers to a process of development which leads to the realization of each human right and of all of them together and which has to be carried out in a manner known as rights-based, in accordance with the international human rights standards, as a participatory, non-discriminatory, accountable and transparent process with equity in decision-making and sharing of the fruits of the process.[32]

The above definition is littered with tautologies: a rights-based process of development is precisely one that produces human rights realisation; and human rights realisation is necessarily based on international human rights standards. But being tautological is not its most serious flaw. If one looks closer, it is difficult to find any value an individual or a people holds dear and aspires that is *not* included in this definition. In other words, every possible individual or societal "good or interest" is encompassed by it. This, in fact, led many critics and sceptics alike to condemn the right to development as a "right to everything."[33]

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[30] AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) 16, 35.

[31] The right to development is sometimes described as "distilled" from existing individual and collective rights or the "sum" of them all. *See* Roland Rich, *The Right to Development as an Emerging Human Right* (1983) 23 VIRGINIA JOURNAL OF INTERNATIONAL LAW 287, 324.

[32] Arjun Sengupta, *The Theory and Practice on the Right to Development* (2002) 24(4) HUMAN RIGHTS QUARTERLY 846.

[33] Felix Kirchmeier, *The Right to Development – Where Do We Stand? State of the Debate on the Right to Development* (Occasional Papers No. 23, Friedrich Ebert Stiftung, 2006) 4.

It is in this context that David Beetham lamented how the existing literature on the right to development has unnecessarily expanded the right well beyond its core meaning, thus sacrificing its "clarity of focus" and diluting its normative force.[34] He then advocated the narrowing down of the right's definition to "a nation's or people's right to economic development."[35] He observed that:

> The more the right to development is expanded to include all possible aspects of development, the more difficult it becomes to specify what would count as a violation or infringement of the right, since almost anything might count as such, and the responsibility for not fulfilling it becomes correspondingly diffuse and unidentifiable. ... In sum, a wide definition of the right to development provides a convenient excuse for the evasion of responsibility.[36]

As will be demonstrated later, it is not the conception of the right to development as an individual human right but rather its collective nature and inter-state dimension that truly makes it a legal tool to address the real problems faced by developing countries.

D. FINDING THE LEGAL BASIS OF THE RIGHT TO DEVELOPMENT IN THE "SOURCES" OF INTERNATIONAL LAW

This article subscribes to legal positivism and adopts it as a distinct methodology in finding the law that applies to sovereign states. The choice of this methodology goes hand in hand with one of the aims of this article: to prove and substantiate the "hard-law" status of the right to development. The task at hand is in keeping with Ian Brownlie's advice to international lawyers (especially those who argue that new legal rules or principles have emerged or are emerging) not to stray away from the confines of positive international law.[37] This positivism demands the "envisaging of international law as positive law, i.e., as *lata*."[38] According to Prosper Weil, this approach requires lawyers to maintain the

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[34] Beetham, *supra* note 2 at 81.

[35] *Id. at 95.*

[36] *Id. at* 83-84.

[37] Ian Brownlie, *The Rights of Peoples in Modern International Law in* JAMES CRAWFORD (ED), THE RIGHTS OF PEOPLES (1992) 1, 14-15.

[38] Prosper Weil, *Towards Relative Normativity in International Law* (1983) 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 413, 421.

"distinction between *lex lata* and *lex ferenda* ... with no abatement of either its scope or its rigor."[39] In this sense, legal positivism is not only a theory on how international law is created by the will of states, but it is also a methodology on how to find it. Brian Lepard summed up the characteristics of legal positivism when he argued that:

> Under traditional "positivist" legal doctrine, norms are considered "law" and to be binding on states to the extent that they arise from treaties or from customary norms that are generally accepted as law. This positivist doctrine results from an emphasis on state autonomy and sovereignty and the notions that only states can create international law and that states can be bound solely by their own free consent.[40]

The idea that international law is a product of state consent is reflected in Article 38(1) of the ICJ Statute.[41] This provision "is widely recognised as the most authoritative and complete statement as to the sources of international law."[42] Outside these sources, any purported norm or rule of international law is regarded as "soft law" and is therefore non-binding. It is essential to debunk notions that the right to development belongs to the realm of soft law and establish its mandatory nature. Therefore, any effort in finding the "source" or "sources" from which the right to development emanates must be consistent with Article 38(1) of the ICJ Statute. The positivist method is not exclusive to traditional international law because it has been employed in other areas as well. For instance, employing legal positivism within international human rights law, Polly Vizard argued that:

> In order to be legally binding under international human rights law, an international standard must fall within the three sources of international law defined in the Article 38(1) of the Statute of the International Court of

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[39] *Id.*

[40] BRIAN LEPARD, RETHINKING HUMANITARIAN INTERVENTION (2002) 100-01.

[41] Article 38(1) of the Statute of the International Court of Justice (ICJ) provides: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

"(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[42] MALCOLM N. SHAW, INTERNATIONAL LAW (6TH ED, 2008) 70.

> Justice (ICJ) (and therefore fall within the scope of an international treaty, international custom, or the general principles of international law).[43]

This article argues that separate and distinct legal norms which are already in existence in international law do reinforce one another in their actual operation, and effectively coalesce under the general rubric of the right to development. In discussing the individual norms that comprise the right to development, this article traces their sources in international treaty, international custom, or the general principles of international law. And whenever there is a need to shed light on the *precise* contents of these norms (i.e. entitlements of the obligee and duties of the obligors), this article relies primarily on the resolutions adopted by the UN General Assembly as interpretative aids. While these resolutions are not *per se* "sources" of international law, their usefulness lies in being authoritative elaborations of existing legal norms *as understood by states.* Oscar Schachter argued that these resolutions may be authoritative evidence of binding international law on one or more of the following grounds: "(a) as 'authentic' interpretations of the UN Charter as agreed by all the parties; (b) as affirmations of recognized customary law; and (c) as expressions of general principles of law accepted by states."[44] Resorting to these resolutions in order to arrive at clearer and more precise legal norms, therefore, does not digress from the theory and methodology of legal positivism. It bears stressing that General Assembly resolutions are also consented to by at least the majority of UN-member states, and thus creating a legitimate expectation that they will act consistently with what the resolutions state. Aside from being authoritative aids for treaty interpretation, General Assembly resolutions may be taken as evidence of the *opinio juris* of states - an indispensable component of customary international law.

E. THE RIGHT TO DEVELOPMENT AS GUARANTEED TO A COLLECTIVE ENTITY – THE "PEOPLE"

In order that the right to development may acquire a more compelling relevance in theory and practice, it is essential to re-envisage it as a "collective

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[43] POLLY VIZARD, POVERTY AND HUMAN RIGHTS: SEN'S 'CAPABILITY PERSPECTIVE' EXPLORED (2006) 142.

[44] Oscar Schachter, *The UN Legal Order: An Overview in* CHRISTOPHER JOYNER (ED), THE UNITED NATIONS AND INTERNATIONAL LAW (1997) 3, 5.

right" like in its original formulation – that is, a people's right to be invoked *on their behalf* by their own state vis-à-vis certain actors in the international community.[45] Mohammed Bedjaoui, one of the exponents of the right to development, argued that "placing the right to development among human rights whose enjoyment we are all too prone to regard as being restricted to the human being as an individual" only weakens the right and "dangerously obscure[s] the real international aspects of the basic problem."[46] He concluded that the right to development is "much more a right of the State or of the people, than a right of the individual."[47] Expanding the right to development by making it both an individual and a collective right only muddles its conceptual clarity and dilutes its strength as a positive rule of international law.

Because the intended beneficiary of the right to development is "the people," certain questions arise in this context. First and foremost, who comprises the people? The definition of this term is controversial, especially as it relates to the right to self-determination.[48] However, for purposes of this article, the term "people" means the community of individuals who receive protection from a state and who, in return, owe a duty of allegiance to that state arising from their nationality. In the context of the right to development, several distinct "peoples" (e.g. indigenous peoples) who physically reside within the territory of a state[49] and are nationals of that state are considered only as a single "people" who holds the right to development. This encompassing conception of the term "people" is an inevitable consequence of the collective nature of the right to development, which is opposable only by the state *in behalf of* its people against the international community.

Who represents the "people" in the international system? Who can legitimately invoke the right to development on their behalf? The prevailing view is that the people can act in the international system only through their state, except in certain situations.[50] Ian Brownlie observed that, in the international system,

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[45] Kirchmeier, *supra* note 33 at 10.

[46] Bedjaoui, *supra* note 1 at 1180.

[47] *Id. at* 1184.

[48] *See* James Crawford, *The Right of Self-Determination in International Law: Its Development and Future in* PHILIP ALSTON (ED), PEOPLES' RIGHTS (2001) 7, 58-60.

[49] The Supreme Court of Canada has recognised that more than one "people" may reside within a single state. *See Reference re Secession of Quebec* (1998) 2 S.C.R. 217.

[50] These situations include people who are subjugated by a colonialist state; people who are under an occupying or invading power; and people who are subjugated by a racist state. Under these situations, these

"the primary obligors and obligees of the right to development – that is, the subjects in the strict sense of those who can either claim entitlements or are potential respondents to such claims – are States."[51] In stating that "states" can claim entitlements, Brownlie did not mean that states possess human or people's rights. Instead, he regarded the state as the legitimate representative of its people in the international stage. It is clear therefore that the right to development is *not* a right of states; but they claim the entitlements that the right entails only as an agent of their respective peoples. Similarly Roland Rich argued that there is "no effective means of implementing the right to development other than through States and their governments."[52] As a collective right, therefore, the right to development only makes sense in the relationship between a state (as the agent of its people), on one hand, and other states or international organisations, on the other. Again, this logically follows from the collective nature of the right to development.

Sticking to the original formulation of the right to development as a collective right of a people preserves its conceptual clarity and focus as a legally binding rule. Conceiving the right to development as a collective right makes possible the identification of precise entitlements and obligations on the part of the "rights-holder" and the "duty-bearers," respectively, as will be shown in the next section. Georges Abi-Saab argued that, in order for the right to development to qualify as a legally binding rule, the "active and passive subjects of the right and its content" must be clearly identified.[53] This identification of the rights-holder and duty-bearer, and what is legally due to and from each, is essential in locating the metes and bounds of a legal right (i.e. what the right *is*).

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peoples in the exercise of their right of self-determination may act in the international system on their own behalf (usually through national liberation movements) without the intercession of the colonialist, occupying or racist state. *See* ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD (1986) 90-95.

[51] IAN BROWNLIE, 'THE HUMAN RIGHT TO DEVELOPMENT' (Study prepared for the Commonwealth Secretariat, Human Rights Unit occasional paper, 1989).

[52] Roland Rich, *The Right to Development: A Right of Peoples? in* JAMES CRAWFORD (ED), THE RIGHTS OF PEOPLES (1988) 39, 53.

[53] Georges Abi-saab, *The Legal Formulation of a Right to Development* in THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL (1980) 163 (Hague Academy of International Law); also cited in HENRY STEINER, PHILIP ALSTON AND RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (2008) 1445-46.

F. THE TWO COMPONENTS THAT MAKE THE RIGHT TO DEVELOPMENT A LEGAL RIGHT

There is a need to resist, both at an intellectual and practical level, the temptation to regard the right to development as the amalgamation of all individual human rights because it effectively dilutes the right's normative character and renders it ineffectual. This article proposes to return to the core of the right to development - to narrow it down to its essential components - if it is to remain a functional concept. These components are the following:

(1) The right of the people to an independent process of economic development; and
(2) The obligation of the international community to establish international conditions which are conducive to the domestic realisation of economic, social and cultural (ESC) rights.

These components are not chosen arbitrarily. The first component is linked to the historical roots of the right to development when it was first articulated by the developing states themselves in the 1960s. The right is historically associated with the principle of economic self-determination and the people's sovereignty over their natural wealth.[54] Meanwhile, the second component represents the "crystallisation" into a binding legal obligation of the consensus among states to create an international order characterised by equal opportunities for economic development for all states. Both components stand on a solid legal footing because each one is founded on legally binding norms already in existence in international law. These constituent norms are the following:

(1) The economic self-determination of a people;
(2) The people's permanent sovereignty over their
(3) natural wealth and resources;
(4) The duty of international cooperation among states;
(5) The duty of preferential treatment of developing states; and
(6) The duty of preventing damage or harm against the rights of another state.

[54] Beetham, *supra* note 2 at 79.

It is submitted that the first two norms – mutually reinforcing one another - are the underlying rationale of the first component of the right to development (i.e. the right to an independent process of economic development); while the last three norms, also interrelated and overlapping, are the pillars of the second component (i.e. the obligation of the international community to create international conditions conducive to the domestic realisation of ESC rights). It bears stressing that the right to development draws its legal strength from both its components and their constituent norms. It is only when these norms are taken together that a more complete structure of the right to development begins to take shape. Mindful of both components, and fusing them together, this article offers this alternative definition of the right to development: The right to development is a right of a people to pursue an independent process of economic development occurring within the broader context of international conditions that are conducive to the progressive realisation of ESC rights within their state.

Consistent with being a legal right in the positivist sense – that is, one that stems from recognised "sources" of international law, this definition presents two readily identifiable entitlements in favour of the people of a state as the rights-holder: First, they have a right to implement a process of economic development independently and free from unwanted pressure, influence or interference from other states or international organisations. Second, the international community has an obligation to establish international conditions that are favourable to the domestic realisation of ESC rights. Milan Bulajic was referring to this second component when he argued that "the international community must assume the correlative obligation of establishing the conditions that permit the attainment of national goals."[55] Certainly, the progressive realisation of ESC rights is an important part of those national goals.

The above definition preserves the original collective nature of the right to development, a right which may be invoked by the people through their own state as their legitimate agent in the international system vis-à-vis the developed states. It removes any embellishment or cosmetics that it is also an individual human right claimable by every individual against his or her state. Explicit in this definition are the following entitlements in favour of the people of a state: first,

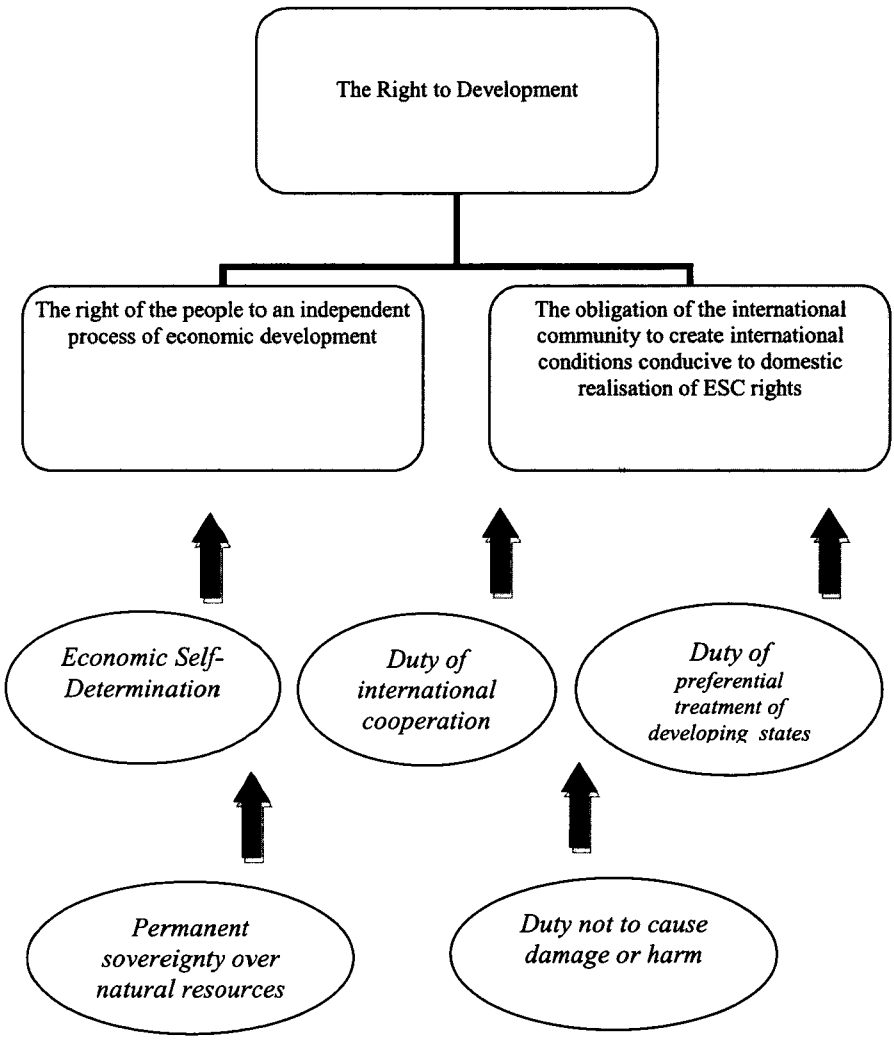
[55] MILAN BULAJIC, PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW (2ND ED, 1993) 16.

they have a right to implement a process of economic development independently and free from unwanted interference from developed states or international organisations; and second, they can expect that the international community will foster conditions that are favourable, rather than harmful or damaging, to the progressive realisation of ESC rights in their territory.

Correspondingly, the following obligations on the part of developed states as duty-bearers of the right to development are clear: first, they have an obligation to respect and protect every people's freedom to pursue their own process of economic development; and second, they have a duty to modify or even discontinue certain activities, such as international economic or financial arrangements, that result in "unfavourable conditions" that damage or harm the progressive realisation of ESC rights in the territory of developing states.

From the perspective of the rights-holder, the right to development has two interrelated components as depicted by *Diagram 1* in the next page.

Diagram 1: **The components and constituent norms of the right to development**



G. THE TIE THAT BINDS: HOW SEPARATE AND DISTINCT NORMS COALESCE UNDER THE RUBRIC OF THE RIGHT TO DEVELOPMENT

This section demonstrates (by parallel and analogous examples in other international law regimes) how these norms, while being separate and distinct from one another, are intimately joined together forming a *de facto* "umbrella" principle called the right to development.

It has become a kneejerk reaction among lawyers, especially positivists, to determine a norm's legal basis by looking at the widely accepted sources of international law, and easily lose sight of the fact that any norm does not operate in a legal vacuum. It always co-exists with other norms that operate simultaneously in a particular regime of international law (e.g. law of armed conflict or law of the sea) and in the broader international legal system. This coexistence and simultaneous operation of norms have been described by the International Law Commission (ILC), thus:

> International law is a legal system. Its rules and principles (i.e. its norms) act in relation to, and should be interpreted against the background of, other rules and principles. As a legal system, international law is not a random collection of such norms. *There are meaningful relationships between them.* ... In applying international law, it is often necessary to determine the precise relationship between two or more rules and principles that are both valid and applicable in respect of a situation.[56] (Emphasis supplied)

Lawyers are so used to imagining the formation of law in the international system as an upward linear progression from non-law (moral norms), to soft law, to hard law, and finally to *jus cogens* at the top. For example, Prosper Weil described the norms in international law as having relative normativity whereby the legal force of each norm is a matter of "more or less" on a gradated scale.[57] While such view is correct, it does not capture the wider picture of related norms simultaneously being observed or complied with by states in actual practice. What drives the behaviour of states as regards a particular international issue is the combination of

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[56] International Law Commission (ILC), *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* YEARBOOK OF THE ILC, 2006 VOL. II, PART TWO, PARAS. 1-2.

[57] Weil, *supra* note 38 at 427.

the related norms they adhere to, or more precisely, the "meaningful relationship" present between or among them.

What emerges from this simultaneous observance of norms is a group of related norms interlocking and overlapping with each other. In their actual operation, related norms interweave and interrelate. The norms' inherent compatibility allows international lawyers (and possibly states as well) to conceive of them as mutually reinforcing each other's legal strength. It is easy to observe this simultaneous observance of norms within a particular regime or related regimes of international law. Take, for instance, the "principle of distinction" which is well-settled in international humanitarian law.[58] A myriad of norms actually comprise this principle that include, *inter alia,* differentiating between combatants and non-combatants; differentiating between civilian objects and legitimate military targets; protection of combatants *hors de combat*; and protection of religious and cultural places. These norms, all operating simultaneously and reinforcing one another, contribute to the legal validity and strength of the broader principle of distinction in international humanitarian law.

Another example of a group of related norms operating concertedly is the fairly advanced principle of the "common heritage of mankind." Jennifer Frakes identified five norms actually comprising the common heritage of mankind principle.[59] First, there can be no private or public appropriation of the common heritage spaces (non-appropriation norm). Second, resources contained in common heritage areas should be managed on behalf of all nations (norm of shared management). Third, all nations must actively share with each other the benefits acquired from the exploitation of the resources from the common heritage areas. Fourth, these areas should not be used for military purposes. Fifth, these areas should be preserved for the benefit of future generations.[60] The validity and strength of the common heritage of mankind principle depend on the

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[58] *See* Marco Sassoli, *Targetting: The Scope and Utility of the Concept of "Military Objectives" for the Protection of Civilians in Contemporary Armed Conflicts* in DAVID WIPPMAN AND MATTHEW EVANGELISTA (EDS), NEW WARS, NEW LAWS?: APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS (2005) 181, 182-84.

[59] Jennifer Frakes, *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?* (2003) 21 WISCONSCIN INTERNATIONAL LAW JOURNAL 409.

[60] *Id.*

commitment of states to comply with (i.e. their state practice) and adhere to (i.e. their *opinio juris*) the individual norms that constitute it.

In the regime of international environmental law, a similar group of related norms operating simultaneously and in unison can be found. Winfried Lang characterised the encompassing "principle/concept of responsibility/liability for environmental damage" as being comprised by the constituent norms of "duty to compensate [and] also the duty to prevent such damage."[61] Because of its compatibility with these two norms, the duty of "notification and information of other states in case either of imminent disaster or of potential damage to be caused by certain planned activities" may also be regarded as incorporated in the broader principle of responsibility/liability for environmental damage. The central idea exemplified by these examples is that individual norms of particular application are conceptually joined together under a broader principle to address a broader problem or issue.

It is their inherent compatibility that binds related norms together. The net effect is to bring about a group of related norms operating concertedly, while maintaining their separate and distinct existence, like different parts of a clock. While this group of related norms does not formally constitute another level in the hierarchy of international law norms (say, in the sense of being higher than *jus cogens*), they virtually form a *de facto* "umbrella" principle encompassing all of them. As part of a cohesive group, a constituent norm is regarded as being more authoritative or legally binding than when it is standing alone. For example, it is difficult for a state to justify its present industrialisation efforts at the expense of damaging its marine or forest resources while still professing its adherence to the encompassing principle of "intergenerational equity" of which "sustainable development" is an integral part.[62]

It must be emphasised that the formation of such a *de facto* umbrella principle is not a new "source" of public international law nor is it a new category of norms or rules. Rather, it is a conceptual device in order to capture and refer to the meaningful relationship that exists between or among related norms in a

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[61] Winfried Lang, *UN-Principles and International Environmental Law in* JOCHEN FROWEIN AND RUDIGER WOLFRUM (EDS), VOL. 3, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW (1999) 157, 165-66.

[62] Sharon Beder, *Costing the Earth: Equity, Sustainable Development and Environmental Economics* (2000) 4 NEW ZEALAND JOURNAL OF ENVIRONMENTAL LAW 227-243.

particular international law regime. Such a device is useful, if not indispensable, in understanding the overall behaviour of states with respect to an international problem or issue which cannot be adequately understood by just looking at a single norm taken in isolation.

In the case of the norms encompassed by the right to development, they first gained prominence in the regime of international economic law after the wave of decolonisation in the 1960s, most especially the right of self-determination (including its economic aspect) and permanent sovereignty over natural resources. In 1974-75, they figured prominently in the calls for the establishment of a "new international economic order" contained in three UN General Assembly resolutions.[63] Later on, in 1977, they acquired more urgency (as well as legitimacy) courtesy of the regime of international human rights law when it became apparent that resource constraints in developing states prevent them from fulfilling the human rights of their own people. It is during this time that development has been viewed as a human right.

This article demonstrates that the right to development is borne out of an incremental process that happened in two separate but interfacing international law regimes: international economic law and international human rights law. The right to development regroups and consolidates into a single rubric certain fundamental norms which are already in existence. Similar to the other "umbrella" principles in international law (such as the principle of distinction, the principle of common heritage of mankind, and the principle of responsibility/liability for environmental damage), the right to development draws its legal strength from the simultaneous and interlocking operation of its constituent norms in the international system.

[63] *Declaration on the Establishment of a New International Economic Order*, GA Res 3201 (S-VI), 1 May 1974; *Programme of Action on the Establishment of a New International Economic Order*, GA Res 3202 (S-VI), 1 May 1974, and *The Charter on Economic Rights and Duties of States*, GA Res 3281 (XXIX), 12 December 1974.

II. THE FIRST COMPONENT: THE PEOPLE'S RIGHT TO AN INDEPENDENT PROCESS OF ECONOMIC DEVELOPMENT

A. WHAT IS AN INDEPENDENT PROCESS OF ECONOMIC DEVELOPMENT?

According to Martin Feldstein, "the legitimate political institutions of [a] country should determine the nation's economic structure and the nature of its institutions."[64] The idea that the legitimate representatives of the people should manage the country's economic system and its economic institutions and policies seems basic and uncontroversial. It is an exercise of that country's sovereignty that its overall economic management is at the hands of its democratically elected government which "constitutes [the] comprehensive and legitimate representative of the people."[65] However, in an economically interdependent world populated by states with highly uneven economic power, there exists a constant threat against the ideal of independent economic decision-making by governments, especially those of the developing countries.

An "independent process of economic development" connotes the idea that the legitimate leaders of the people do have effective control over the direction of the country's economic development and its various facets. This process ought to be a course of action that is participatory, accountable and responsive.

Anne Orford argued that, in order for a development process to be participatory, the "people should have control over the direction of the development process, rather than simply being consulted about projects or policies that have already been decided upon."[66] Conflicting development goals ought to be harmonised after meaningful consultations with the concerned sectors and other stakeholders. An "accountable" process of development entails that the particular administration and its economic managers who are responsible for the

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[64] Martin Feldstein, *Refocusing the IMF* (1998) 77(2) FOREIGN AFFAIRS 20-33.

[65] Frances Stewart and Michael Wang, *Poverty Reduction Strategy Papers within the Human Rights Perspective in* PHILIP ALSTON AND MARY ROBINSON (EDS), HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT (2005) 447, 452.

[66] Orford, *supra* note 7 at 138-39; citing Human Rights Council of Australia Inc., *The Rights Way to Development: A Human Rights Approach to Development Assistance* (1995) 118-21.

wrong economic decision must be ultimately answerable to the people.[67] The idea of accountability is a sort of insurance held by the people that the leaders in charge of their economy would competently perform the trust conferred upon them. There is no accountability when the economic decision is externally imposed by international financial institutions which are far removed from the people in terms of effective remedial measures. Finally, an independent process of economic development must be responsive to real needs and be able to shift its development goals as the need arises. Determined by internal and external factors, a country's needs vary as it moves towards modernity. Its development process should be able to respond to these needs in a fairly adequate and timely manner.

An independent process of economic development therefore encourages inputs from domestic economic sectors, and actually moulds them into concrete economic policies. First and foremost, the process ought to be responsive to these inputs from stakeholders within the country.[68] The country's economic institutions must allow these inputs to reach its decision-makers through the appropriate channels before they craft the country's development agenda. Such channels may include mandatory grassroots consultations in the local governments to "pulse" the people regarding their development needs. Economic prescriptions from external actors, while not always detrimental, should carry lesser importance if they contravene the development goals prioritised and reached during the participatory process. At the very least, a meaningful participatory process ought to result not only in perfunctory consultations but, more importantly, in effective influence over the final design and contents of a country's development agenda.

While all countries are duty-bound to respect and protect the people's right to an independent process of economic development, it is the developed states that are more prone to violate it because of their predisposition (if not predilection) to impose their own brand of economic philosophy upon poor countries.

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[67] Gobind Nankani, John Page and Lindsay Judge, *Human Rights and Poverty Reduction Strategies: Moving Towards Convergence?, in* PHILIP ALSTON AND MARY ROBINSON (EDS), HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL ENFORCEMENT (2005) 475, 492-93.

[68] N. Nelson and S. Wright, *Participation and Power in* N. NELSON AND S. WRIGHT (EDS) POWER AND PARTICIPATORY DEVELOPMENT (1995) 1-18.

B. TWO NORMS SUPPORTING THE EXISTENCE OF THE RIGHT TO AN INDEPENDENT PROCESS OF ECONOMIC DEVELOPMENT

1. The Economic Self-Determination of Peoples

Article 1(2) of the UN Charter provides that one of the organisation's purposes is the development of friendly relations among states based upon the "principle of equal rights and self-determination of peoples."[69] That the right to self-determination is recognised in the UN Charter itself, which some regard as the constitutional document of present-day international system,[70] shows the right's high priority in the hierarchy of international law norms. The International Court of Justice (ICJ) has stated that the "assertion that the right of peoples to self-determination, as it evolved from the [UN] Charter and from United Nations practice, has an *erga omnes* character, is irreproachable."[71] Aside from the UN Charter, other major treaties recognise the existence of the right to self-determination. Common Article 1(1) of the ICESCR and the ICCPR provides that: All peoples have the right of self-determination. By virtue of that right they freely determine their political status and *freely pursue their economic, social and cultural development.*"[72]

It is clear that the right to self-determination has two legal implications: a people can choose whatever type of government they wish *and* they can freely undertake their economic, social and cultural development. It is the right's "economic aspect" that needs to be emphasised here – that which guarantees the freedom of peoples in their pursuit of "economic development." Although strictly a non-binding instrument, the 1970 Declaration on Principles of International Law Concerning Friendly Relations may be regarded as an "authoritative interpretation" of UN Charter provisions dealing with the right of self-determination.[73] The Declaration states, *inter alia*, that "all peoples have the right freely to determine, *without external interference*, their political status and to pursue their economic, social

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[69] *Charter of the United Nations*, 1 UNTS XVI, art 1(2).

[70] *See generally*, BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (2002).

[71] *Case Concerning East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 102, paras 23-35.

[72] *ICCPR*, opened for signature 16 December 1966, 999 UNTS No. 14668 (entered into force 23 March 1976) and *ICESCR*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976), common art 1(1). (Emphasis added)

[73] Shaw, *supra* note 42 at 253.

and cultural development"[74] and that all states have the duty to respect this right. Allan Rosas explained that "[t]he right of peoples to freely pursue their economic, social and cultural development means a right of non-interference and ... also a certain basic freedom to economic, social and cultural activities."[75]

The economic self-determination of peoples necessarily entails an independent control over the direction of a country's economy (i.e. where it is going) and an effective involvement in economic planning (i.e. how to get there). Without these, self-determination is never complete. This is only logical because, for a people who have liberated themselves from a colonial, occupying or racist state and have declared political independence, its newly found freedom will be meaningless if this is not coupled with the freedom to choose an economic system viable for its country and the freedom to determine its own model of economic development. This is not to say, however, that the right to self-determination is applicable only for peoples escaping the clutches of colonialism, occupation or racism as argued by some commentators.[76] The right's inclusion in the ICESCR and ICCPR ensures its continuing applicability well beyond the context of colonialism, occupation or racism. James Crawford observed that the right's inclusion in the two covenants has a "tone of universality."[77] Consistent with this view, the International Law Commission (ILC) expressed its opinion that the right of self-determination is of universal application.[78] In the two articles of the UN Charter where the right is mentioned (i.e. Articles 1.2 and 55), the contexts are different from issues of colonialism, occupation or racism, which suggests the right's applicability in other situations.[79] Thus, the people of a state that is not colonialist, occupying nor racist have *inter alia* the inherent freedom to choose their economic system and to determine their own model of economic development.

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[74] *Declaration on Principles of International Law Concerning Friendly Relations,* GA Res 2625 (XXV), Annex, 25 UN GAOR, Supp. (No. 28), UN Doc A/5217 at 121 (1970). (Emphasis added)

[75] Allan Rosas, *The Right of Self-Determination in* ASBJORN EIDE, CATARINA CRAUSE AND ALLAN ROSAS (EDS), ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK (1995) 79, 83.

[76] Antonio Cassese, for example, argues that present-day international law limits the application of the right to self-determination to three situations: "(1) an anti-colonial postulate; (2) a criterion for condemning those forms of oppression of a people involving the "occupation" of territory; (3) an anti-racist postulate." Cassese, *supra* note 50 at 135.

[77] James Crawford, *The Rights of Peoples: Peoples or Governments?* in JAMES CRAWFORD (ED), THE RIGHTS OF PEOPLES (1988) 55, 58.

[78] ILC, *Yearbook of the International Law Commission* (1988) vol. II, Part 2, 64; also cited in Shaw, *supra* note 42 at 290.

[79] Crawford, *supra* note 77 at 58.

Self-determination, including its economic dimension, is therefore a continuing right of the people that does not end with political emancipation. Even after political emancipation, the right continuously guarantees that the people can genuinely manage or lead their economic future.

2. The People's Permanent Sovereignty over Their Natural Wealth and Resources

The "sovereign equality of states" is a cornerstone of present-day international law. In fact, it is securely enshrined in the UN Charter which provides that the "[o]rganisation is based on the principle of the sovereign equality of all its Members."[80] Ian Brownlie explained the centrality of "state sovereignty" in present day international law when he stated that "sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality."[81] There is a specific aspect of state sovereignty that is inextricably connected to the people's right to an independent process of economic development. This is the principle of "permanent sovereignty over natural resources."[82] The principle of permanent sovereignty over natural resources has gained wide acceptance among states.[83] It is recognised in both the ICESCR and the ICCPR in their common Article 1(2) and another common article (Articles 25 and 47, respectively) which state that:

> All peoples may, for their own ends, *freely dispose of their natural wealth and resources* without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.[84] (Emphasis Supplied)

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[80] *Charter of the United Nations,* 1 UNTS XVI, art 2(1).

[81] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287 (4TH ED, 1990).

[82] *Permanent Sovereignty over Natural Resources,* GA Res 1803 (XVII), 17 UN GAOR Supp. (No.17) at 15, UN Doc A/5217 (1962).

[83] Crawford, *supra* note 77at 63.

[84] *ICCPR,* opened for signature 16 December 1966, 999 UNTS No. 14668, art 1(2) (entered into force 23 March 1976); *ICESCR,* opened for signature 16 December 1966, 999 UNTS 3, art 1(2) (entered into force 3 January 1976).

> Nothing in the present Covenant shall be interpreted as impairing *the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.*[85] (Emphasis Supplied)

The principle of "permanent sovereignty over natural resources" was further elaborated by the UN General Assembly through the Charter on the Economic Rights and Duties of States. While the principle originally covered physical resources such as minerals, flora and fauna, the General Assembly explained its coverage to include all of a country's "wealth, natural resources and *economic activities.*"[86] The inclusion of "economic activities" in the principle assures the people's sovereign right to regulate or manage all economic activities within their country for their own ends.

Nico Schrijver summarised the most important implications of the principle of permanent sovereignty over natural resources, particularly for the peoples of developing countries.[87] Aside from the principal rights to possess, use and dispose of their natural resources, this principle supports *inter alia* the right of a people "to withdraw from unequal investment treaties and to renounce contractual relations when one party unjustly enriches itself thereby" and the right "to revise the terms of an arrangement in the exercise of [their] legislative competence."[88] Subrata Roy Chowdhury characterised the principle of permanent sovereignty over natural resources as "a seminal source for rules from which a State can derive a wide range of powers to exercise control over production and distribution arrangements in aid of its right to development."[89]

Based on the foregoing, the principle of permanent sovereignty over natural resources implies that, if foreign control or influence inhibits a country

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[85] *ICCPR*, opened for signature 16 December 1966, 999 UNTS No. 14668, art 47 (entered into force 23 March 1976); *ICESCR*, opened for signature 16 December 1966, 999 UNTS 3, art 25 (entered into force 3 January 1976).

[86] *Charter on the Economic Rights and Duties of States*, GA Res 3281(XXIX), UN GAOR, 29th Sess., Supp. No. 31, A/RES/29/3281 (1974), art 2(1). (Emphasis added)

[87] Nico Schrijver, *Permanent Sovereignty Over Natural Resources Versus the Common Heritage of Mankind: Complementary or Contradictory Principles of International Economic Law?* in PAUL DE WAART, PAUL PETERS AND ERIK DENTERS (EDS), INTERNATIONAL LAW AND DEVELOPMENT (1988) 87, 90.

[88] *Ibid.*

[89] Subrata Roy Chowdhury, *Permanent Sovereignty Over Natural Resources: Substratum of the Seoul Declaration'* in PAUL DE WAART, PAUL PETERS AND ERIK DENTERS (EDS), INTERNATIONAL LAW AND DEVELOPMENT (1988) 59, 80.

from possessing, using or disposing of their natural wealth and resources as they deem proper, then the principle is infringed. Moreover, a people cannot involuntarily renounce their right to possess, use and dispose of their natural resources without compromising this principle. Of course, a people can voluntarily allow multinational corporations or other states to economically exploit their natural resources (for example, in an oil exploration agreement) but that action is not violative of their permanent sovereignty over natural resources; it is in fact consistent with it because they had the freedom to choose to allow or prevent foreign economic exploitation.[90]

C. POSSIBLE VIOLATIONS OF THE RIGHT TO AN INDEPENDENT PROCESS OF ECONOMIC DEVELOPMENT

One obvious violation of the right to an independent process of economic development is "economic coercion." Azadon Tiewul described economic coercion as "an attempt to constrain state conduct through the use of withholding of economic resources."[91] Economic coercion can take on many forms and degrees ranging from, for example, discreet impositions in an onerous trade agreement to outright trade embargoes. The term "economic coercion" does not include economic sanctions that may be lawfully imposed by the Security Council under the UN Charter.[92] What the term encompasses are interventions in the internal and external affairs of another state using economic measures. This makes economic coercion legally at odds with another fundamental principle of international law: the principle of non-intervention.[93] Citing several declarations of the UN General Assembly, Oscar Schachter argued that "economic coercion directed against the sovereign rights and independence of any state has been

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[90] An analogy may be made with the application of the principle of non-intervention in the domestic affairs of a state. In the exercise of its sovereignty, a country may invite another country to intervene in the former's internal affairs without derogating that sovereignty. *See generally*, ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2006) 53.

[91] S. Azadon Tiewul, *The UN Charter of Economic Right and Duties of States* (1975) 10 JOURNAL OF INTERNATIONAL LAW AND ECONOMICS 645, 670.

[92] The Security Council may act under Chapter VII of the UN Charter whenever it is satisfied of "the existence of any threat to the peace, breach of the peace, or act of aggression" (art 39). In any of these three situations, the Security Council may call on UN member states to apply economic, political, diplomatic or other sanctions against the culprit state (art 41) or, if these measures are unsuccessful, to take such military action "as may be necessary to restore international peace and security." (art 42). *See Charter of the United Nations,* 1 UNTS XVI, arts 39-42.

[93] Detlev Chr. Dicke, *The Concept of Coercion: A Wrong in Itself in* PAUL DE WAART, PAUL PETERS AND ERIK DENTERS (EDS), INTERNATIONAL LAW AND DEVELOPMENT (1988) 187, 190.

declared to be in violation of international law."[94] The 1974 Resolution on Permanent Sovereignty over Natural Resources specifically deplores acts of states which use economic coercion.[95]

A violation of a people's right to an independent process of economic development is most pronounced in situations where an external economic "prescription" directly contravenes a policy expressly adopted by a country's legislative body. This is because their legislative body is the repository of the collective will of their people. Policy-makers who sit in these bodies are the legitimate "representatives" of the people. To overturn legislative policies is to disregard their sovereign will. For example, the National Assembly of Nicaragua unanimously suspended in August 2002 all private concessions involving water use which is undoubtedly part of Nicaragua's natural wealth and resources. However, the country was advised (or effectively required) by its creditors to privatise the state's hydroelectric company.[96] In Zambia, the state national bank was privatised as required by its creditors despite a resolution from the Zambian parliament opposing such privatisation in December 2002.[97] In 1996, the government of Papua New Guinea had to introduce a new forestry revenue system that the IMF required of it to do, scrapping certain amendments to the country's forestry law that the Fund did not recommend.[98]

Sabine Michalowski equated the above examples as "a factual loss of sovereignty over their economic and social policies."[99] This was precisely the fear of some members of the British Parliament when they were presented the blueprint of the planned international credit union (which would eventually become the IMF) in the early 1940s – that IMF programs "would entail policy

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[94] Oscar Schachter, *The Evolving International Law of Development* (1976) 15 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 1, 14.

[95] *Resolution on Permanent Sovereignty over Natural Resources,* GA Res 3171, 28 UN GAOR, Supp 30 at 52, Doc A/9030 (1974).

[96] Peter Hardstaff, *Treacherous Conditions: How IMF and World Bank policies tied to debt relief are undermining development* (2003) World Development Movement *available at* www.wdm.org.uk (May 2, 2009).

[97] *Ibid.*

[98] Peter Larmour, *Conditionality, Coercion and Other Forms of 'Power': International Financial Institutions in the Pacific* (2002) 22(3) PUBLIC ADMINISTRATION AND DEVELOPMENT 249-60.

[99] Sabine Michalowski, *Sovereign Debt and Social Rights – Legal Reflections on a Difficult Relationship* (2008) 8 (1) HUMAN RIGHTS LAW REVIEW 35, 37.

conditions that would impinge upon national sovereignty" of member states.[100] They were assured by John Maynard Keynes who developed the British proposal for such credit union that the future IMF would only offer limited policy "advice" to governments and their economic and social policies would be "immune from criticism by the fund."[101] History would later prove Keynes wrong on this point.

D. THE IMF'S PURPORTED EMPHASIS ON "NATIONAL OWNERSHIP" OF ECONOMIC DEVELOPMENT PROCESS

At least in theory, the International Monetary Fund (IMF) admits that a development process should be "country-owned", which implies that the formulation of economic policies must be left in the hands of national authorities.[102] Mark Plant argued that, in fairness to the IMF, it is "trying to understand how to open the macroeconomic policy debate to a broader range of stakeholders, recognizing the benefits of such a broadening."[103] Exposing this rhetoric from the IMF, Angela Wood aptly described the IMF's attitude in the preparation of program documents purportedly "owned" by debtor countries:

> However, governments often have little choice but to agree to an IMF program and the IMF is by no means a passive advisor. Indeed, the IMF regards itself as an enforcer of policy change. [A past evaluation of an IMF lending program] heard from developing country officials that the IMF had an 'inflexible attitude' and that the IMF often came to negotiations with fixed positions so that agreement was usually only possible through compromises in which the country negotiating teams moved to the Fund's positions.[104]

Several authors analysed the dynamics of the relationship between developing countries and the IMF, and have arrived at the similar conclusion that the IMF has real and effective power to shape economic policies in these

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[100] JAMES RAYMOND VREELAND, THE INTERNATIONAL MONETARY FUND: POLITICS OF CONDITIONAL LENDING (2007) 21-22.

[101] *Ibid.*

[102] Nankani *et al, supra* note 67 at 483-89.

[103] Mark Plant, *Human Rights, Poverty Reduction Strategies, and the Role of the International Monetary Fund in* PHILIP ALSTON AND MARY ROBINSON (EDS), HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT (2005) 498, 503.

[104] Angela Wood, *Power Without Responsibility? Enhancing Learning and Policy Accountability at the IMF* in BARRY CARIN AND ANGELA WOOD (EDS), ACCOUNTABILITY OF THE INTERNATIONAL MONETARY FUND (2005) 67, 70.

countries. According to Gerry Helleiner, the IMF has "a major effect upon the design of macroeconomic policy in the poorest countries" through the application of its conditionalities and the leverage it has over debt relief.[105] William Canak and Danilo Levi lamented the fact that the IMF is "fashioning the economic policies for the debtor nations, including decisions that have powerful effects on domestic conditions."[106] According to them, this situation creates a "maximum amount of uncertainty for debtor nations and a maximum amount of flexibility and control for creditors."[107] Anne Orford similarly observed that:

> The detail of the prescriptions imposed by the IMF and the [World] Bank make it impossible for the people of target states to determine the nature of the economic, and thus the political, system in which they live. People in such states *are not free to choose forms of economic or social arrangements* that differ from the models chosen by those who work for the IMF or the World Bank.[108] (Emphasis supplied)

Still, other authors maintain that the IMF's dealings with developing countries amount to much more than exerting influence, but they are in fact outright coercion or imposition. Angela Wood explained that the Fund employs its supposed superior "technical know-how" in order to "impose policies on weaker governments against their wishes and often those of their citizens too."[109] Sharing this view, Martin Feldstein cautioned creditor countries and the IMF not to take advantage of "currency crises as an opportunity to force fundamental structural reforms on countries, however useful they may be in the long term."[110] Along the same line, Ariel Buira argued that the desperate financial and economic situation a country finds itself in "does not give the IMF the moral right to substitute its technical judgments for the outcome of the nation's political processes."[111]

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[105] Gerry Helleiner, *External Conditionality, Local Ownership and Development in* JIM FREEDMAN (ED), TRANSFORMING DEVELOPMENT: FOREIGN AID FOR A CHANGING WORLD (2000) 90-91.

[106] William Canak and Danilo Levi, *Social Costs of Adjustment in Latin America in* JOHN F. WEEKS (ED), DEBT DISASTER? BANKS, GOVERNMENTS, AND MULTILATERALS CONFRONT THE CRISIS (1989) 143, 155.

[107] *Ibid.*

[108] Orford, *supra* note 7 at 152.

[109] Wood, *supra* note 104 at 68

[110] Feldstein, *supra* note 64 at 20-33.

[111] Ariel Buira, *An Analysis of IMF Conditionality in* ARIEL BUIRA (ED), CHALLENGES TO THE WORLD BANK AND IMF (2003) 55, 57.

III. THE SECOND COMPONENT: ESTABLISHING INTERNATIONAL CONDITIONS FAVOURABLE TO THE REALIZATION OF ESC RIGHTS

A. WHAT ARE INTERNATIONAL CONDITIONS?

Economist Raul Prebisch, writing in the 1950s, hypothesised that certain "structural disadvantages" exist in the international system that prevent developing countries from achieving economic development.[112] It is the recognition of these structural disadvantages that propelled the idea that changes in the international economic order – the kind that will enable poor countries to enhance their capacity to fulfil ESC rights – are warranted. Jeffrey Sachs also had these unfavourable global features in mind when he argued that poor countries have critical needs that cannot be solved by domestic policy reforms alone but are needs that must be addressed at the global level.[113] Others argued that it is the very setup of the present international economic order that hinder or impair developing countries' ascent in the development ladder.[114] Margot Salomon, for example, argued that "the global institutional system, as currently designed, allows for the perpetuation of poverty or, at a minimum, has failed sufficiently to relieve poverty and the situation is worsening."[115] In its extreme form, this argument takes the shape of the *dependencia* theory which blames all domestic woes on the developed world. For some scholars steeped in this theory, the main cause of the overall condition of developing countries is their seriously disadvantaged position in the global economic and political system.[116]

The existence of an international order (or certain features of it) which does not favour the realisation of human rights has been alluded to by the UN General Assembly in significant resolutions adopted by it. For example, the Universal Declaration of Human Rights (UDHR) provides that "[e]veryone is entitled to a social and *international order* in which the rights and freedoms set forth

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[112] Kirchmeier, *supra* note 33 at 8.

[113] JEFFREY SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES OF OUR TIME (2005) 280.

[114] Bedjaoui, *supra* note 1 at 1181.

[115] Margot Salomon, *International Human Rights Obligations in Context: Structural Obstacles and the Demands of Global Justice in* BARD ANDREASSEN AND STEPHEN MARKS (EDS), DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL AND ECONOMIC DIMENSIONS (2006) 96, 117.

[116] *See generally*, F. H. CARDOSO AND E. FALETTO, DEPENDENCY AND DEVELOPMENT IN LATIN AMÉRICA (1979); G. KÖHLER AND A. TAUSCH, GLOBAL KEYNESIANISM: UNEQUAL EXCHANGE AND GLOBAL EXPLOITATION (2002).

in this Declaration can be fully realized."[117] Also, the Declaration on the Right to Development recognises the inadequacy, if not the failing, of certain features of the international system and demands "the creation of national and *international conditions* favourable to the realization of the right to development."[118] Similarly, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, provides that "[t]here is a need for States and international organizations ... to create favourable *conditions* at the national, regional and *international levels* to ensure the full and effective enjoyment of human rights."[119] In these declarations, there is an underlying acknowledgement that the international system has certain features, both political and economic, that are detrimental to the capacity-building efforts of developing states, and over which they have little control or influence. They find themselves amidst an international environment that significantly affects them or their people, usually in a harmful or damaging way, but which they are nearly powerless to modify or change.

What then are the concrete examples of international conditions that are, or ought to be made conducive to the realisation of ESC rights within states? While not meant to be exhaustive, a list of broad suggestions was provided by a diplomat when, during a deliberation on the right to development, he stated that:

> [V]arious countries should promote the democratization of international relations, establish a fair and equitable international ... economic order, and guarantee the right of equal participation of developing countries in the decision-making of global economic affairs. The international community should also create a favorable international environment for development through various measures such as adjusting the system of international financial institutions, opening up of the markets of developed countries to developing countries, and the expansion of trade with and the transfer of new and high technology to the latter.[120]

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[117] *Universal Declaration of Human Rights,* UN GA Res 217A(III), UN Doc A/810(1948), art 28. (Emphasis supplied)

[118] *Declaration on the Right to Development,* UN GAOR, 41st Sess., Supp. No. 53, UN Doc. A/RES/41/128 (1986), art 3(1). (Emphasis added)

[119] *Vienna Declaration and Programme of Action,* adopted by the World Conference on Human Rights on 25 June 1993, A/CONF.157/23 (1993), Part I, para. 13. (Emphasis added)

[120] Statement by Ambassador Wang Shijie, Advisor of the Chinese Delegation on the Right to Development (item 7) at the 57th Session of the Commission on Human Rights (26 March 2001) *available at* www.china-un.ch/eng/rqrd/thsm/t85130.htm (Jan. 17, 2010).

B. THE INTERNATIONAL COMMUNITY'S OBLIGATION TO ESTABLISH INTERNATIONAL CONDITIONS CONDUCIVE TO THE REALIZATION OF ESC RIGHTS

This article argues that, on the basis of the right to development, the international community has an obligation to create international conditions that allow developing countries to achieve their national goals, including the realisation of ESC rights. Conversely, the international community has an obligation to modify or even discontinue international conditions that impair the developing countries' efforts to progressively realise ESC rights in their domestic sphere.

The term "international community" generally refers to the aggregate of actors operating in the international system, including states, intergovernmental organisations, multi-national corporations and even non-governmental organisations.[121] To refer particularly to states, the term "international community of states" is usually employed to mean all UN member states. However, in discussions involving the so-called "horizontal" dimension of human rights obligations (e.g. discussions on the philosophical notion of "global justice"[122] or the legal claim of "extra-territorial" human rights obligations[123]), the term "international community" may be understood in the limited sense as referring only to the developed countries. Usually, in this context, a conceptual dichotomy is made between the ailing state, on one hand, and the developed countries collectively referred to as the "international community," on the other. Margot Salomon pointed out this specific usage of the term, thus: "In the context of international development and the alleviation of world poverty, the term "international community" might be used narrowly, applying to those states in positions of power and influence over the international economic order."[124]

The ESCR Committee similarly emphasised that, although international cooperation for development and realisation of ESC rights is incumbent upon all

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[121] MARGOT SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS (2007) 18-9.

[122] *See generally*, Thomas Pogge, *Severe Poverty as a Human Rights Violation* in THOMAS POGGE (ED), FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR (2007) 30; JON MANDLE, GLOBAL JUSTICE (2006).

[123] *See generally*, MARK GIBNEY AND SIGRUN SKOGLY (EDS), UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS (2010); FONS COOMANS AND MENNO KAMMINGA (EDS), EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2004).

[124] MARGOT SALOMON, 'INTERNATIONAL HUMAN RIGHTS OBLIGATIONS IN CONTEXT: STRUCTURAL OBSTACLES AND THE DEMANDS OF GLOBAL JUSTICE,'*supra* note 115 at 99.

states, it entails more responsibility on the part of developed states. The Committee stated that the realisation of ESC rights "is particularly incumbent upon those States which are in a position to assist others in this regard."[125] More than any other actors in the international system, it is the developed states (owing to their increased economic power and political influence) who are most capable of shaping or re-shaping a world order that is more conducive to the realisation of ESC rights within states. In arguing that the second component of the right to development rests on the shoulders of the "international community," this article specifically refers to the developed states.

The obligation of the international community to establish international conditions conducive to the domestic realisation of ESC rights is supported by three norms. As mentioned in Part 1, they (and their respective "sources") are the following:

1. The Duty of International Cooperation among States

There exists a norm in international law that directs states to cooperate with one another to achieve certain goals set forth in the UN Charter, including the realisation of ESC rights. This duty of international cooperation is not merely deduced or implied from some abstract duties of states (say, the duty of friendly relations). Rather, it is a concrete duty whose mandatory character is supported by treaty law – that is, Articles 55 and 56 of the UN Charter and Article 2(1) of the ICESCR. The consent of states to be bound by the duty of international cooperation is expressly given in the form of these treaty commitments. Indeed, the clearest manifestations of states' consent to be bound by rules are the treaties they adhere to. For as Louis Henkin stated, "[t]reaties epitomize the principle of consent."[126] Manisuli Ssenyonjo argued that the duty of international cooperation "may be regarded as one element of the more extensive right to development"[127] which contributes to the right's overall normative force.

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[125] ESCR Committee, General Comment 3, *The Nature of States Parties' Obligations, Article 2(1) of the ICESCR*, (5th sess, 1990) UN Doc HRI/GEN/1/Rev.7, para. 14.

[126] LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES (1995) 28.

[127] MANISULI SSENYONJO, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW (2009) 70.

Articles 55 and 56 of the UN Charter provide as follows:

> Article 55. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> *(a)* higher standards of living, full employment, and conditions of economic and social progress and development.
> *(b)* solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
> *(c)* universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
>
> Article 56. All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

On the strength of the above provisions, some scholars contended that the right to development has a strong legal basis.[128] Khurshid Iqbal, for example, argued that "the main principle" that gives legal force to the right to development is the well-established duty of states to cooperate with one another.[129] Roland Rich similarly argued that the duty to cooperate is "the fundamental source of the right to development."[130]

However, the duty of international cooperation has its share of sceptics who view that the duty to cooperate as formulated in Articles 55 and 56 of the UN Charter "remains rather abstract and permits a relatively wide margin of discretion regarding its practical interpretation and application."[131] It is submitted that this criticism is misguided, rather overly harsh, in its insistence for specifics in a constitutional document that the UN Charter is. Edward Kwakwa responded to the same criticism by arguing that:

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[128] PHILIP ALSTON, HENRY STEINER AND RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (3ND ED, 2008) 1442-52.

[129] Iqbal, *supra* note 4 at 4.

[130] Rich, *supra* note 31 at 291.

[131] Danilo Türk, *Participation of Developing Countries in Decision-Making Processes* in PAUL DE WAART, PAUL PETERS AND ERIK DENTERS (EDS), INTERNATIONAL LAW AND DEVELOPMENT (1988) 341, 342.

> article 56 of the Charter clearly obligates a state to do something towards the achievement of the purposes [of the UN] set forth in article 55. This implies a right to do nothing does not exist. ... [W]hile the provisions are general, nevertheless they have the force of positive international law and create basic duties. Political and juridical organs of the UN have also interpreted the provisions of articles 55and 56 as constituting legal obligations. The preferable view, therefore, is that these Charter provisions establish firm commitments in the form of a binding treaty obligation.[132]

It is clear that all UN members bear the duty to cooperate and that they are required to take joint and separate action in co-operation with the UN for the solution of international problems. Actual examples of "joint and separate action" contemplated by Article 56 are varied, among which are scientific and technological cooperation, transfer of technology, as well as cultural and educational cooperation. Because the types of cooperation are as numerous as the number of international problems they are meant to address, it is unrealistic to enumerate them all in the UN Charter. That, however, does not mean that the duty to cooperate is abstract and vague. The purposes of international cooperation are crystal clear, namely, the achievement of the three objectives enumerated in Article 55. Responding to the same criticism against Articles 55 and 56, Louis Sohn argued that both treaty provisions carry the force of positive international law and they do impose clear obligations which all member-states must fulfil.[133]

In addition to Articles 55 and 56 of the UN Charter, Philip Alston and Gerard Quinn argued that three provisions of the ICESCR are susceptible to an interpretation that developed states have an obligation "to provide assistance to poorer states parties in situations in which the latter are prevented by a lack of resources from fulfilling their obligations under the Covenant."[134] First among these is the clause "to take steps, individually and *through international assistance and cooperation*, especially economic and technical" found in Article 2(1) of the

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[132] Edward Kwakwa, *Emerging International Development Law and Traditional International Law – Congruence or Cleavage?* (1987) 17 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 431, 442.

[133] Louis Sohn, *The Shaping of International Law* (1978) 8 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 18.

[134] Philip Alston and Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the ICESCR* (1987) 9 HUMAN RIGHTS QUARTERLY 156, 186.

ICESCR.[135] The full import of this clause led some commentators to argue that, even standing alone, it provides the legal basis for the right to development. The second provision is Article 11(1) which mandates states parties to fulfil the "right to an adequate standard of living" of their people while recognising "the essential importance of international co-operation based on free consent" to achieve this goal. Finally, the third provision is Article 11(2) which, although concerning the specific "right to be free from hunger," directs states parties to take steps "individually and through international co-operation" to achieve this right.

Stephen Marks assigned a heavy significance on the duty "to take steps, individually and through international assistance and cooperation" found in Article 2(1) as providing a legal basis for the reciprocal obligations between and among states parties to the ICESCR.[136] According to his view, this duty provides the ICESCR a sort of "horizontal" dimension, meaning the existence of an obligation among the states parties *inter se,* as opposed to a "vertical" dimension that involves obligations owed by a state party to its own population. He argued that the full realisation of ICESCR rights cannot be attained in a piecemeal fashion:

> but only through a policy that is deliberately designed to achieve all the rights, progressively and in accordance with available resources. These are the legal obligations of each of [the] states parties not only to alter its internal policy but also to act through international cooperation and assistance toward the same end.[137]

However, the duty of international cooperation may be given a restrictive interpretation which, if proven to be valid, weakens the legal force of the right to development. According to this interpretation, the obligation of developed states extends only as far as participating in international agencies concerned with development issues such as, for example, the United Nations Development Program (UNDP) or the Organisation for Economic Cooperation and Development (OECD), without more.[138] In other words, developed states fully comply with the duty to cooperate even when they engage only in nominal

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[135] *ICESCR,* opened for signature 16 December 1966, 999 UNTS 3, art 2(1) (entered into force 3 January 1976). (Emphasis added)

[136] Stephen Marks, *Obligations to Implement the Right to Development: Philosophical, Political, and Legal Rationales in* BARD ANDREASSEN AND STEPHEN MARKS (EDS), DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL AND ECONOMIC DIMENSIONS (2006) 57, 72-73.

[137] *Ibid.*

[138] *Ibid.*

participation in these agencies. However, this restrictive interpretation is not consistent with the intent of the framers of ICESCR which requires "effective" international cooperation – which means cooperation that produces concrete results and not just perfunctory or general involvement in the activities of international agencies.[139]

Certainly, the framers of the UN Charter did not intend Articles 55 and 56 to be meaningless provisions out of which no state duty can be deduced. Even adopting a restrictive interpretation of these provisions, a concrete duty can still be read out of them – that is, the "obligation of conduct" that states must engage in international cooperation regardless of its outcome.[140] Criticising this restrictive interpretation, Stephen Marks stated that it ignores "the politically significant pronouncements of high-level conferences and legally significant interpretations of expert bodies,"[141] all of which "provide a considerable degree of guidance as to the specifics of the general legal obligation of international cooperation."[142] Also, the appropriate construction of a treaty provision (or, in the case of the duty of international cooperation, treaty provisions) is that interpretation which will make it operative and meaningful.[143] The restrictive interpretation does the complete opposite and should therefore be rejected.

Furthermore, the consent of states to be bound by the duty of international cooperation has been reiterated in non-binding, yet persuasive, declarations from the UN General Assembly and high-level conferences of world leaders. These declarations are further evidence of state practice and *opinio juris* as to the "hard-law" status of such duty. To underscore the imperativeness and

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[139] The word "effective" is defined as "producing the intended or expected result." MACQUARIE POCKET DICTIONARY (3RD ED, 1998) 330.

[140] An "obligation of conduct" is one where a state party is required to carry out a specific course of action which is regarded as a goal in itself. It is different from an "obligation of result" which requires a state party to actually achieve a particular objective or outcome. *See especially*, V. Dankwa, C. Flinterman and S. Leckie, *Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998) 20 HUMAN RIGHTS QUARTERLY 705; citing the *Report of the International Law Commission* (1977) 2 YEARBOOK OF INTERNATIONAL LAW 20, PARA. 8.

[141] Marks, *supra* note 136 at 73.

[142] *Id* at 74.

[143] This corresponds to the functional or teleological method of treaty interpretation which takes into account the "object and purpose" of the treaty and goes beyond, if necessary, the confines of the text. *See especially*, Mark Toufayan, *Human Rights Treaty Interpretation: A Postmodern Account of Its Claim to "Speciality"* (Working Paper No. 2, Center for Human Rights and Global Justice, New York University, 2005) 7.

continuing relevance of this duty, the developed states have time and again reiterated their commitment to undertake "effective international cooperation and assistance" in at least two politically significant documents: the Vienna Declaration on Human Rights in 1993,[144] and the Millennium Declaration in 2000.[145] The latter, which contains the Millennium Development Goals (MDGs), is the most recent evidence of the developed states' adherence to the duty of international cooperation.[146] In a historic meeting in September 2000, world leaders "convincingly expressed a global determination to end some of the most challenging and vexing problems inherited from the twentieth century."[147] The Millennium Declaration reiterates the need for the developed states to engage in effective international cooperation in the form of "a global partnership for development."[148] Felix Kirchmeier argued that this global partnership is crucial because it "provides a basis for the achievement of the other seven goals. Only with the help of a global partnership will it be possible for many developing countries to reach the goals."[149] This goal of global partnership is merely a restatement or reiteration of the duty of international cooperation enshrined in the UN Charter more than half a century ago.

2. The Duty of Preferential Treatment of Developing Countries

Before a group is said to enjoy preferential treatment compared to other groups, it is first necessary to identify that group as distinct or unique from the rest. Have developing countries become distinct or unique subjects of international law? Roland Rich believes so, as evidenced by the fact that developing countries has been regarded as a separate group in various international instruments adopted over many decades, ranging from human rights treaties to the UN Convention on the Law of the Sea.[150] He argued that some treaties "show an awareness of developing countries as a special, protected category of States."[151] Isabella Bunn agreed that "developing countries are, in some respects, treated as special subjects

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[144] *Vienna Declaration and Program of Action,* adopted by the UN World Conference on Human Rights, 25 June 1993, UN Doc. A/CONF.157/24 (1993), (Part I) at 20-46, art 10; reprinted in 32 ILM (1993) 1661.

[145] *The Millennium Declaration,* UNGA Res A/RES/55/2 (2000).

[146] BERTRAND RAMCHARAN, CONTEMPORARY HUMAN RIGHTS IDEAS (2008) 92-96.

[147] Sachs, *supra* note 113 at 210.

[148] *Id* at 212.

[149] Kirchmeier, *supra* note 33 at 17.

[150] Rich, *supra* note 52 at 48.

[151] *supra* note31 at302.

of international law", as evidenced by various resolutions adopted by the UN General Assembly dealing with them as a distinct grouping of states.[152]

But have developing countries been treated preferentially? Again, both authors believe so because developing countries "are beneficiaries *as such* of special rights in international law" not conferred to other subjects of international law.[153] Relating it to the duty of international cooperation, Isabella Bunn argued that the duty of preferential treatment of developing countries "is grounded in a duty to cooperate for development, and has emerged over several decades of state practice."[154] Evidence of state practice in this regard can be found in different areas of international law, among which are: in some human rights treaties;[155] in agreements that give trade concessions;[156] in the provisions of the UN Convention on the Law of the Sea (UNCLOS) giving certain benefits to developing countries;[157] and in the practice of providing development assistance. Although with respect to the last one, most developed states still consider it as a matter of discretion and benevolence rather than as a matter of legal obligation.

Preference is also accorded to developing countries in international agreements relating to investment, natural resources, relocation of industry, the oceans, international liquidity, and other related areas.[158] There are various manifestations that since the spate of decolonisation in the 1960s, the least developed countries have been treated as a distinct group in international law and are entitled to certain preferences on that basis. Quite recently, the Millennium Development Goals include a commitment among world leaders to "develop a global partnership for development" that aims to "address the *special needs* of the

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[152] Bunn, *supra* note 28 at1449.

[153] Rich, *supra* note52 at 48. (Emphasis added)

[154] Bunn, *supra* note 28 at 1448.

[155] The ICESCR, for example, recognises the special circumstance of developing countries and takes into account their "available resources" in gauging compliance with the Covenant.

[156] Bernard Hoekman, Constantine Michalopoulos and L. Alan Winters , *Special and Differential Treatment of Developing Countries in the WTO: Moving Forward After Cancún* (2004) 27 (4) THE WORLD ECONOMY 481-506.

[157] The UNCLOS contains certain provisions that give preferences to developing countries in the areas of, *inter alia,* access to fishing zones (Article 62) and access to seabed mining technology (Annex III, article 5.3.e).

[158] Schachter, *supra* note 94 at 9.

least developed countries" in the areas of international trade, external debt, health and technology.[159]

Oscar Schachter analysed the common rationale that underlies the preferential treatment of developing countries in these areas. He concluded that it is actually "the idea of need as a basis for entitlement."[160] However, what he found remarkable is not its espousal by its beneficiaries (i.e. developing countries) which is to be expected, but its general acceptance by the developed countries against whom the idea will be invoked. Schachter argued that the "scale and duration" of the practice of giving preferential treatment to developing countries "have been substantial enough to demonstrate the practical acceptance of a responsibility [on the part of developed states] based on the entitlement of those in need."[161] In other words, the practice of giving preferential treatment to developing countries has crystallised into a customary norm of international law. However, Schachter is quick to point out that the idea of need as a basis for entitlement is different from the Marxist ideal of "to each according to his needs, from each according to his ability," rather the idea is confined with the "provi[sion] for the minimal human needs of the most disadvantaged segments of society."[162]

Emphasising what the duty of preferential treatment of developing countries adds to public international law, Milan Bulajic argued that:

> The problems of development cannot be resolved on the basis of the principles of peaceful co-existence among States with different political and economic systems. Coexistence as a minimum standard for preserving world peace, should be further developed and it should be the duty of all States to cooperate for development, *on the basis of preferential and non-reciprocal treatment of developing countries.*[163] (Emphasis supplied)

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[159] *The Millennium Declaration,* UNGA Res A/RES/55/2 (2000), containing the Millennium Development Goals, Goal 8, Target 8b. (Emphasis added)

[160] Schachter, *supra* note 94 at 10.

[161] *Ibid.*

[162] *Ibid.*

[163] Bulajic, *supra* note 55 at 44.

3. The Duty of Preventing Damage or Harm against the Rights of Another State

The final norm that supports the second component of the right to development is the rule that a person, in the exercise of his or her right, must not cause damage or harm to the rights of another. Transported in the international setting, the same proscription applies to equal and sovereign states - that is, they should refrain from causing damage or harm to the entitlements of other states. This is the rule against abuse of one's rights: *sic utere tuo ut alienum non laedas.*[164] This rule can be found in "the majority of the legal systems of the world."[165] It is a widely held rule such that it qualifies as a "general principle of law among civilised nations" – another accepted source of international law according to Article 38(1) of the ICJ Statute.[166]

The duty of preventing damage or harm against the rights of another, being a general principle of law, has been impliedly accepted by states. The prevailing view is that general principles of law, as a distinct source of international law, are "principles common to the domestic law of developed legal systems."[167] Martti Koskenniemi characterised them as "generalizations from municipal jurisprudence."[168] The implied acceptance by states comes in the form of the adoption of these principles in almost all fairly advanced legal systems of the world. States have impliedly given their consent to a general principle by its mere presence and continued use in their respective legal jurisdictions. Speaking about the nature of general principles applied by international tribunals, Louis Henkin supported this view and argued that "recourse to principles of domestic law, even if they have not yet become 'internationalized' by custom or treaty, does not

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[164] "One should use his own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY (6TH ED, 1990) 1380.

[165] Enrique Gomez-Pinzon, *'State Responsibility for External Consequences of Domestic Economic-Related Acts* (1986) 16 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 52, 79.

[166] Oscar Schachter classified five groups of general principles of international law that have been applied in international cases: (1) principles of municipal law 'recognised by civilized nations'; (2) general principles of law 'derived from the specific nature of the international community'; (3) principles 'intrinsic to the idea of law and basic to all legal systems'; (4) principles 'valid through all kinds of societies in relationships of hierarchy and co-ordination'; and (5) principles of justice founded on 'the very nature of man as a rational and social being'. *See* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE (1991) 50-55.

[167] Henkin, *supra* note 126 at 40.

[168] Martti Koskenniemi, *The Pull of the Mainstream'*(1990) 88 MICHIGAN LAW REVIEW 1946, 1950.

derogate from the principle of consent" which forms the basis of the international law-making process and that "[g]eneral consent is properly assumed."[169]

The *Trail Smelter* case (US v. Canada)[170] and the *Lake Lanneux* (France v. Spain) arbitration case[171], explicitly recognised, and in fact applied, the proscription on all states from causing damage or harm to the rights of another state. In the *Trail Smelter* case, the arbitration tribunal concluded that:

> Under the principles of international law... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[172]

Almost two decades after, the same principle was reiterated by the arbitration tribunal in the *Lake Lanoux Case.* The tribunal applied the principle of abuse of rights when it stated that the upstream state (France), in the exercise of its lawful activities involving the lake within its territory, is obliged to consider the interests of the downstream state (Spain) and "to strive to give them all satisfactions compatible with the pursuit of its [France] own interests."[173]

David Beetham contended that "it would be difficult to contest the principle that the first duty of governments, as of citizens also, is not to cause damage or harm" to the rights of another.[174] This translates into a practical rule of conduct in the international system, according to him, that states have the duty "not to initiate or support policies or institutional arrangements, whether domestic or international, which systematically damage any country's economic development."[175] James Crawford considered this as the negative duty of every

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[169] Henkin, *supra* note 126 at 40.

[170] *Trail Smelter Case* (*United States v. Canada*), 3 R.I.A.A. 1905 (1941). In this case, smelting operations in British Columbia in Canada resulted in fumes being emitted into the atmosphere which caused damage or harm to US citizens in Washington state. Pursuant to an agreement, the case was referred to a three-member arbitration tribunal.

[171] *Lake Lanoux Case* (*Spain v. France*), 24 INTERNATIONAL LAW REPORTS 101 (1957). In this case, France proposed to use the waters of Lake Lanoux for some hydro-electric works. The waters of Lake Lanoux also flow into the River Carol which goes into Spain. Claiming damage or harm against its interests, Spain objected against the use of France of the waters of Lake Lanoux.

[172] *Trail Smelter Case, surpa* note 170 at 1965.

[173] *Lake Lanoux Case, supra* note 171 at 119.

[174] Beetham, *supra* note 2 at 84.

[175] *Ibid.*

state not to impede the development of another state,[176] presumably not just in purely economic terms, but more importantly, with respect to the human rights realisation of its people. Because every state has a sovereign mandate (i.e., they are duty-bound vis-à-vis their own people) to realise the ESC rights of its population, all other states have the duty not to damage or harm such realisation.

Two scenarios are possible here: intentional and unintentional damage or harm to another state. With respect to the first, the duty of preventing damage or harm clearly applies as it is precisely meant to prohibit a state from damaging or harming another through ill-will, malice or *dolo*. For example, if the coastal state of Cameroon knowingly prohibits the transport of international food aid on its territory *en route* to the starving population of Chad, a landlocked state, then the former causes damage or harm to the latter through *dolo*. The latter's population is denied their right to food. Meanwhile, the proscription equally applies when the damage or harm done against a state is the result of another state's negligence, lack of foresight or skill, or other specie of *culpa*. For example, if Saudi Arabia (a host state) entered into a labour agreement with Yemen (a sending state) which provides that Yemeni migrant workers who also speak Arabic will be recruited over a certain period to eventually replace all other migrant workers in the former's state oil company, thousands of whom are nationals of the Philippines (another sending state), then Saudi Arabia caused damage or harm to the Philippines through *culpa* by denying the right to work of thousands of its nationals. The duty not to cause damage or harm is still breached even though the guilty state's action is ostensibly within its prerogative and short of malice or ill-will, but nonetheless failed to take into consideration the human rights violation in another state. Therefore, a state incurs state responsibility if it causes damage or harm to another state as a result of either malicious conduct or an unintentional act but with reckless disregard to the wellbeing of other peoples.

The Charter of Economic Rights and Duties of States provides a strong normative language that lends support to the duty of states "not to cause damage or do harm" to the lawful interests of other states, particularly in the economic realm. It also finds affirmation in the following provision of the Charter: "All States have the duty to conduct their mutual economic relations in a manner which

[176] Crawford, *supra* note 77 at 66.

takes into account the interests of other countries. In particular, *all States should avoid prejudicing the interests of developing countries.*"[177]

This duty "not to cause damage or do harm" is required of states not only in their bilateral or multilateral dealings with each other but also in their actions or activities within the international organisations they belong to, including international financial institutions like the IMF and the World Bank. The Maastricht Guidelines, another interpretative document, provides that "[i]t is particularly important for States to use their influence to ensure that violations do not result from the programs and policies of the organizations of which they are members."[178] Thus, for example, if an international organisation implements a program or policy that damages or does harm to a particular state, responsibility therefore is attributable not only to the organisation itself, a distinct juridical entity capable of bearing obligations, but also to its member states that voted in favour of such program or policy. Sigrun Skogly argued that:

> Based on the provisions in the [ICESCR], as well as customary international law, creditor states are equally *required to take into account the human rights effects in third countries of the decisions that they make within the IFIs.* These states, therefore, are obliged to consider how individual projects, programs, and policies may affect the population in the countries where they are to be implemented and to alter them when necessary to avoid possible human rights violations.[179] (Emphasis supplied)

What Skogly advocated is akin to the duty of due diligence on the part of developed states in ensuring that their policies do not adversely affect the human rights efforts of developing countries. Manisuli Ssenyonjo also argued that developed states must refrain "from participation in decisions of intergovernmental bodies, such as the IMF, the World Bank and the WTO, that are *reasonably foreseeable* to obstruct or hinder the progressive realisation of ESC rights in other states."[180] What is expected, therefore, is the observance of

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[177] *Charter on the Economic Rights and Duties of States,* GA Res 3281(XXIX), UN GAOR, 29th Sess., Supp. No. 31, A/RES/29/3281 (1974), art 24. (Emphasis added)

[178] *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,* 20 HUMAN RIGHTS QUARTERLY 691-705, GUIDELINE 19.

[179] Sigrun Skogly, *The Role of the International Financial Institutions in a Rights-Based Approach to the Process of Development in* BARD ANDREASSEN AND STEPHEN MARKS (EDS), DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL AND ECONOMIC DIMENSIONS (2006) 284, 298.

[180] Ssenyonjo, *supra* note 127 at 73. (Emphasis added)

prudence and foresight by the developed states that whatever they (and entities under their jurisdiction like private corporations) do that has transnational ramifications ought not to cause damage or harm to the efforts of developing states towards ESC rights realisation.

C. THE SECOND COMPONENT DISTINGUISHED FROM THE PURPORTED DUTY OF DEVELOPED STATES TO FULFILL THE ESC RIGHTS OF THE PEOPLES OF DEVELOPING COUNTRIES

It bears stressing that the obligation to create "favourable international conditions" is not identical to any purported legal duty of developed states that involves directly fulfilling the ESC rights of the peoples of developing states as if the developed states are the primary obligors. How much, and to what extent, does international law require developed states in discharging their obligation to establish international conditions conducive to the domestic realisation of ESC rights? Are they obligated to directly transfer resources to the developing countries? Are they required to redistribute wealth on a global scale? These questions demand clear answers in order to allay fears that the developed states, in discharging their obligation to create favourable international conditions, will be compelled to perform duties against their will and be required to sacrifice more than they can bear at the expense of their own people. This apprehension is unfounded because, to the extent that the second component of the right to development rests on already existing norms of international law, no duty will be exacted from the developed states that they have not given their consent to.

The purported legal duty of developed states that involves directly transferring their resources to fulfil the ESC rights of peoples other than their own is associated with two alleged international law duties: (1) duty to give development assistance or aid, and (2) the duty to make reparations for "historical" wrongs. In the current state of international law, the existence of such duties is highly controversial and no agreement among states is in sight.

1. Duty to Give Development Assistance or Aid

The existence in international law of a duty on the part of developed states to provide development assistance or aid to developing states is

controversial. This purported duty requires developed states to actually transfer resources to developing states that need them. Taking the affirmative side of the debate, Roland Rich argued that this duty exists in international law, thus:

> In practice, however, the principle of affirmative action in favour of developing countries is already largely established. The right to development would place this practice in the framework of international human rights law. Affirmative action would no longer be considered as a discretionary practice, nor as amends for past guilt, nor as a political concession, but as a human rights obligation. The acceptance of aid and affirmative action programmes by recipient countries would also be seen in a human rights context.[181]

On the other hand, some argued that requiring developed states to pro-actively fulfil the ESC rights of the peoples of the developing countries is contrary to the principles of state sovereignty. Philip Alston pointed out the "persistent objection" of most developed states against the claim that there exists a legal obligation to give development assistance or aid.[182] He observed that "even the most generous of donors [failed] to locate their assistance within the context of such obligation."[183]

Between these two extremes lies a middle ground position that the majority of developed countries are most likely amenable to. This is the provision of emergency assistance to help a population in distress as a result of conflict, famine or natural disaster. The provision of relief assistance such as food, medicine and clothing in these situations does not violate the non-intervention principle.[184] Many developed states feel that it is incumbent upon them, at least morally, to provide assistance when there is extreme deprivation of human rights inside a state. For example, when the population of a state is being decimated by an internal conflict like the situation in Darfur, Sudan in early 2003,[185] many developed states felt duty-bound to provide aid and at times even emboldened to

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[181] Rich, *supra* note 52 at 53.

[182] Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals* (2005) 27 HUMAN RIGHTS QUARTERLY 775-77.

[183] *Ibid.*

[184] *See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), supra* note 80, para. 242.

[185] Human Rights Watch, *If We Return, We Will be Killed: Consolidation of Ethnic Cleansing in Darfur, Sudan* (2004) *available at* http://hrw.org/backgrounder/africa/darfur1104/ (Jan. 7, 2010).

help the aggrieved population in the name of emergency assistance.[186] Philip Alston explained that whenever there exists an extreme deprivation of human rights (like widespread starvation as a result of conflict, famine or natural disaster), the territorial state is under an obligation to seek international assistance and the rest of the world has the correlative obligation to actively provide such assistance.[187] Henry Shue later expounded on this "duty to give aid" to developing countries if and when their respective governments have failed to provide a minimum guarantee of subsistence together with a minimum protection of physical security to their people. In such eventuality, Shue argued that "the international community not only may but ought to step in."[188]

However, aside from situations involving extreme deprivation of human rights, the duty to give development assistance or aid is highly controversial. Due to the absence of *opinio juris* on the part of the developed states, it is safe to say that such duty has not yet crystallised into a binding norm of customary international law.

2. The Duty to Make Reparations for "Historical Wrongs"

The purported duty to make reparations for certain "historical wrongs" attributed to developed states is the most controversial. In addition to making reparations (i.e. actual transfer of resources) for the harm or damage done against an aggrieved state, this duty necessarily involves an acknowledgement of guilt or wrongdoing committed in the past. August Reinisch considered this corrective duty as "the reclamation of [the developed states'] state responsibility [which] presupposes a past wrongdoing which should be remedied ... as a matter of international law."[189]

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[186] Amnesty International, *Darfur: What hope for the future? Civilians in urgent need of protection* (2004) *available at* http://web.amnesty.org/library/index/engafr541642004 (Jan. 7, 2010).

[187] Philip Alston, *International Law and the Human Right to Food in* PHILIP ALSTON AND KATARINA TOMASEVSKI (EDS), THE RIGHT TO FOOD (1984) 43.

[188] HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND US FOREIGN POLICY (2ND ED, 1996) 174.

[189] August Reinisch, *Debt Restructuring and State Responsibility Issues in* DOMINIQUE CARREAU AND MALCOLM SHAW (EDS), LA DETTE EXTERIEURE (1995)537, 597.

For instance, some scholars are concerned with finding the legal basis of the alleged duty of former colonial countries to compensate their erstwhile colonies for the exploitation of the latter's natural resources.[190] Other scholars work on the theoretical underpinnings of a so-called "environmental debt" that developed countries allegedly owe to the developing countries for the degradation of the latter's environment during the industrial era.[191] These examples illustrate the claim that a past wrong, or a "historical mistake," attributable to developed countries can be a source of a legal duty to rectify the past. Such, however, remains at best a "moral" claim that has not transcended the threshold between non-law and law because of the persistent objection on the part of the developed states.

There is an obvious difference between the direct provision of resources to developing states as a matter of legal duty, on one hand, and the second component of the right to development which allows developing countries to produce those resources for themselves in an even international playing field where every state has equal opportunities to develop, on the other. The former is not part of international law as yet, while the latter is. There is an explanation for this dichotomy: the purported duties to provide development assistance or aid and to make reparations for past wrongs – duties that involve direct transfer of resources to developing states – have not yet received the required acceptance by the developed states to be regarded as legal rules. In contrast, the obligation on the part of developed states to establish conditions at the international level that would encourage, rather than impede or frustrate, the realisation of ESC rights within the developing states has already been consented to by the former.

What the second component requires is having an international order devoid of unfair or exploitative arrangements in trade, finance, use of natural resources, international lending practices, and so forth. The task of realising ESC rights remains with the territorial state as the primary obligor, but its efforts towards this goal ought to be matched correspondingly by developed states operating on the international plane with a view to removing unfavourable conditions that impair the former's capacity to do its task.

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[190] Rich, *supra* note31 at 292.

[191] DAMIEN MILLET AND ERIC TOUSSAINT, WHO OWES WHO? 50 QUESTIONS ABOUT WORLD DEBT (2004) 127-30.

CONCLUSION

In sum, the right to development is a legal right guaranteed to peoples and not to individuals. It is a composite of fundamental norms that rest on a firm foundation under positive international law. For quite some time, it has been, and it still is, part of *de lege lata*. However, the tendency of its proponents to expand its reach, in their eager desire to solve all the problems of this world, makes it prone to the accusation that it is still a "soft law" or part of *de lege ferenda*.

The right to development has two components giving it the character of a "legal right." *First*, by virtue of the first component of the right to development, there is an obligation to respect and protect a people's right to manage its own economy in general and its right to an independent economic planning in particular. *Second*, on the strength of the second component of the right to development, the international community has an obligation to establish international conditions which are conducive to the domestic realisation of ESC rights. The dual nature of the right to development is a failed experiment to synthesise all human rights into one "mega-right" because its final product turned out to be a legal "Frankenstein" with an over-reaching goal but with an imprecise substance. Emboldened by the dualist perspective put forward by the Declaration on the Right to Development, but surely motivated by good intentions, the proponents of an expansive right to development are actually doing it a disservice by weakening its normative strength.

This article provides the necessary counter-argument against this trend in the articulation of the right and invites other scholars to intelligently question the dualist perspective and to re-conceive the right as a collective right of peoples that guarantees clear entitlements to its holder and imposes precise obligations to its duty-bearers. Such re-conceptualisation is needed if the right to development is to be of any significance to practitioners and scholars of international human rights law, and indeed to the ultimate beneficiary of the right.

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